S Manickam & Ors v Ismail bin Mohamad & Ors

HIGH COURT (SHAH ALAM) — SUIT NO 22-107-1990
LOW HOP BING J
24 JULY 1996

Civil Procedure *— Pleadings — Striking out of statement of claim — Plea of fraud and illegality — Whether plaintiffs' statement of claim discloses a reasonable cause of action against the defendants — Whether statement of claim discloses serious questions to be tried — Rules of the High Court 1980 O 18 r 19(1)(a)*

The plaintiffs claimed against the sixth, seventh and eighth defendants ('the defendants') for fraud and prayed that the transfer of the subdivided portions of a piece of land ('the land') be declared invalid and that all endorsements relating thereto be cancelled and expunged. In its statement of claim, the plaintiffs averred, inter alia, that the transfer was duly registered in favour of the fifth defendant irregularly, fraudulently and invalidly and that the cancellation of the endorsement on the land office title of two private caveats lodged by the plaintiffs on the land was invalidly and illegally done. The defendants applied to strike out the plaintiffs' statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC'). The learned senior assistant registrar allowed the application and ordered that the plaintiffs' statement of claim be struck out for not disclosing any cause of action. The plaintiffs appealed. The issue was whether the plaintiffs had pleaded a triable issue based on or arising out of fraud against the defendants

Held, allowing the appeal:

From the averments in the statement of claim, it was apparent that the plaintiffs had pleaded both fraud and illegality. Under O 18 r 12(1)(a) of the RHC, the particulars of fraud have to be stated in the pleadings.

Although the averments in the plaintiffs' statement of claim did not set out the full particulars of fraud, specific reference to some elements of fraud were made therein which could not be completely ignored by the court. The court had the duty to consider all those averments, albeit incomplete, for whatever they were worth in their original version, to ascertain if there was in effect a reasonable cause raised therein. On the facts of this case, the averments in the statement of claim did raise a reasonable cause of action.

Further, rules of court do provide for the amendment of the plaintiffs' statement of claim to bring out a complete particularization of fraud. This was also a serious issue to be tried.

In addition to the averment of fraud, the plaintiffs also raised the plea of illegality in the transfer of the land whereby the plaintiffs had been rendered the aggrieved parties as their rights had been allegedly affected. There was therefore a reasonable cause of action or at any rate a serious question to be tried.

Since the plaintiffs' statement of claim did disclose a reasonable cause of action against the defendants, the learned senior assistant registrar had erred in striking it out against the sixth, seventh and eighth defendants (see pp 94G, 95D–F and 96F).

[Bahasa Malaysia summary

Plaintif-plaintif telah menuntut terhadap defendan keenam, ketujuh dan kelapan untuk fraud dan memohon bahawa pindahmilik bahagian-bahagian yang dipecahkan atas tanah yang dipegang di bawah EMR 3323 No Lot 1025, Mukim Cheras, Daerah Kajang diisytiharkan tak sah dan bahawa semua pengendorsan yang berkaitan dengannya dibatalkan dan dipadam. Dalam pernyataan tuntutannya, plaintif-plaintif menyatakan, antara lain, bahawa pindahmilik itu telah didaftarkan memihak kepada defendan kelima di luar aturan, secara fraud dan tak sah dan bahawa pembatalan pengendorsan hakmilik pejabat tanah dua kaveat persendirian yang dikemukakan oleh plaintif-plaintif atas tanah tersebut telah dilakukan secara tak sah dan menyalahi undang-undang. Defendan-defendan memohon untuk membatalkan pernyataan tuntutan plaintif-plaintif di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Penolong kanan pendaftar yang arif membenarkan permohonan itu dan memerintah supaya pernyataan tuntutan plaintif-plaintif dibatalkan atas alasan ia tidak mendedahkan sebarang kausa tindakan. Plaintif-plaintif membuat rayuan. Isu adalah sama ada plaintif-plaintif telah menghujahkan suatu isu yang boleh dibicarakan berdasarkan atau yang timbul daripada fraud terhadap defendan-defendan.

Diputuskan, membenarkan rayuan:

Daripada pengataan-pengataan dalam pernyataan tuntutan, adalah nyata bahawa plaintif-plaintif telah menghujahkan fraud dan kepenyalahan undang-undang. Di bawah A 18 k 12(1)(a) KMT, butir-butir fraud hendaklah dinyatakan dalam pliding.

Walaupun pengataan-pengataan dalam pernyataan tuntutan plaintif-plaintif tidak menyatakan butir-butir penuh fraud, rujukan spesifik kepada beberapa unsur fraud telah dibuat di dalamnya yang tidak boleh diabaikan sepenuhnya oleh mahkamah. Mahkamah berkewajipan untuk mempertimbangkan semua pengataan tersebut, walaupun tidak lengkap, untuk menentukan sama ada suatu kausa munasabah telah dibangkitkan di dalamnya. Atas fakta kes ini, pengataan-pengataan tersebut memang membangkitkan suatu kausa tindakan yang munasabah.

Selanjutnya, kaedah-kaedah mahkamah memperuntukkan pindaan pernyataan tuntutan plaintif-plaintif bagi mendedahkan suatu pembutiran fraud yang lengkap. Ini juga merupakan suatu isu serius untuk dibicarakan.

Sebagai tambahan kepada pengataan fraud, plaintif-plaintif juga telah membangkitkan hujah kepenyalahan undang-undang dalam pindahmilik tanah tersebut di mana plaintif-plaintif telah dijadikan pihak-pihak terkilan kerana hak-hak mereka dikatakan telah terjejas.

Maka terdapat suatu kausa tindakan yang munasabah atau walau apa pun suatu soalan serius untuk dibicarakan. A

Oleh kerana pernyataan tuntutan plaintif-plaintif memang pun mendedahkan suatu kausa tindakan yang munasabah terhadap defendan-defendan keenam, ketujuh dan kelapan, penolong kanan pendaftar telah melakukan kesilapan dalam membatalkannya terhadap defendan-defendan keenam, ketujuh dan kelapan (lihat ms 94G, 95D–F dan 96F).] B

Notes

For cases on striking out of pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2649–2769. C

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)
Milbank v Milbank [1900] 1 Ch 376 (refd) D
Philipps v Philipps & Ors (1878–79) 4 QBD 127 (refd)
Saunders v Jones (1877–78) Ch D 435 (refd)
Thomson v Birkley [1882] 47 LT 700 (refd)
Thorp v Holdsworth (1876) 3 Ch D 637 (refd)
Wong See Leng v C Saraswathy Ammal [1954] MLJ 141 (refd) E
Woolley v Broad [1892] 2 QB 317 (refd)

Legislation referred to

National Land Code 1965 s 340(1), (2)
Rules of the High Court 1980 O 18 r 19(1)(a), (2), O 20 F

Kanesalingam (*Kanesalingam & Co*) for the plaintiffs.
Ling Shih Shiun (*Lee Perara & Tan*) for the sixth, seventh and eighth defendants.

Cur Adv Vult G

Low Hop Bing J:

Appeal

On 10 November 1995, the learned senior assistant registrar made an order that the plaintiffs' statement of claim against the sixth, seventh and eighth defendants be struck out. The plaintiffs have now appealed against that decision. H

The defendants' application I

The sixth, seventh and eighth defendants' application in encl 29 was grounded upon the reason that the plaintiffs' statement of claim against the sixth, seventh and eighth defendants does not disclose any cause of action. Apparently, this application was founded upon O 18 r 19(1)(a) of

A the Rules of the High Court 1980 ('the RHC'), which means that in such an application, no affidavit evidence shall be admissible: O 18 r 19(2) of the RHC. In the circumstances, I shall refer to the parties' pleadings to determine whether on the averments therein, a reasonable cause of action has been disclosed.

B *The facts*

The following facts, as ascertained from the plaintiffs' statement of claim, are undisputed:

(i) At various dates in 1978 and 1979, the first, second and third
C defendants agreed to sell subdivided portions of the land held under Title EMR 3323 Lot No 1025, Mukim of Cheras, District of Kajang ('the said land') to the first – eighth plaintiffs.

(ii) The plaintiffs claimed to have paid certain sums to the first, second and third defendants who did not carry out any transfer of any
D portion of the said land to any of the plaintiffs.

(iii) On 27 March 1990, the first, second and third defendants transferred the said land to the fifth defendant.

(iv) On 4 June 1990, the first and second plaintiffs entered private caveats against the said land.

E (v) On 27 December 1991, these private caveats were removed by the Land Administrator on the application of the fifth defendant.

(vi) About 12 months later, on 10 December 1992, the fifth defendant transferred the said land to the sixth, seventh and eighth defendants.

F *The plaintiffs' submission*

It was submitted on behalf of the plaintiffs that the plaintiffs' statement of claim, in particular, paras (18), (20) and (21) did disclose a reasonable cause of action based on fraud and/or illegality. The plaintiffs further contended that the court can only strike out the claim against the sixth,
G seventh and eighth defendants if it is 'obviously unsustainable'.

The defendants' contention

The defendants are of the view that the plaintiffs are making three claims, viz:

H (i) against the first, second and third defendants, for breach of contract;

(ii) against the fifth defendant, for fraud; and

(iii) against the sixth, seventh and eighth defendants, for fraud.

In this appeal, the court is only concerned with whether the plaintiffs have
I a cause of action against the sixth, seventh and eighth defendants.

The plaintiffs pray that the transfer of the said land, in favour of the sixth, seventh and eighth defendants on 10 December 1992, be declared invalid and that all endorsements relating thereto be cancelled and expunged.

The sixth, seventh and eighth defendants submitted at great length on the absence of fraud on their part and relied upon s 340(1) and (2) of the National Land Code 1965. The sixth, seventh and eighth defendants further argued that to justify the court to make the orders as in the prayers claimed against them, the plaintiffs must allege and prove that the sixth, seventh and eighth defendants had obtained their registered title to the said land by committing fraud. Thus, the issue is whether the plaintiffs have pleaded a triable issue based on or arising out of fraud against the sixth, seventh and eighth defendants. The sixth, seventh and eighth defendants held the view that there is no triable issue against them.

The decision of the court

Upon a proper perusal of the plaintiffs' statement of claim, I observe that the averments in respect of the sixth, seventh and eighth defendants appear in paras (18), (20) and (21), which are reproduced below:

> (18) The plaintiffs will contend that the fifth defendant irregularly presented the transfer in favour of the sixth, seventh and eighth defendants on 10 December 1992 and had the said transfer duly registered irregularly, *fraudulently* and invalidly. (Emphasis added.)
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> (20) The plaintiffs will contend that the said instrument of transfer registered on 10 December 1992 in favour of the sixth, seventh and eighth defendants was improperly registered and the said registration should be considered null and void because the cancellation of the endorsement on the land office title of the two private caveats lodged by the first and second plaintiffs was invalidly and *illegally* done. (Emphasis added.)
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> (21) In the alternative, the plaintiffs will contend that the fifth, sixth, seventh and eighth defendants had full knowledge of the interest of the plaintiffs from the contents of the private caveats lodged on 4 June 1990 by the first plaintiff and the previous second plaintiff, Krishnan s/o Govindan who died on 12 June 1991 which said two private caveats were duly filed and were available for inspection in the land office and are still so available.

From the above averments in the statement of claim, it is apparent that the plaintiffs have pleaded both fraud and illegality. Under O 18 r 12(1)(a) of the RHC, the particulars of fraud have to be stated in the pleadings.

In *Mallal's Supreme Court Practice*, it was stated (at pp 204–205) that:

> *Object of particulars.* The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise: *Speeding v Fitzpatrick* (1888) 38 Ch D 410 at p 413. Particulars prevent surprise at the trial, and limit inquiry at the trial to matters set out in particulars. They tend to narrow issues, and ought to be encouraged' (per Watkin Williams J in *Thomson v Birkley* (1882) 47 LT 700). See also *Woolley v Broad* [1892] 2 QB 317 and *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141, CA.
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> The particulars will also enable the other side to know what evidence they ought to be prepared with for the trial: *Thorp v Holdsworth* (1876) 3 Ch D 637 at p 639; to limit the generality of pleadings: *Saunders v Jones* (1877)

A 7 Ch D 435; or of the claim or the evidence or the issues to be tried: *Milbank v Milbank* [1900] 1 Ch 376; or to tie the hands of the party so that he could not without leave go outside the matters in his pleadings: *Philipps v Philipps & Ors* (1878–79) 4 QBD 127.

...

B *Particulars of fraud must be pleaded.* A general allegation of fraud, however strong the words used, where there is no statement of circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any court ought to take notice: *John Wallingford v The Directors & C of the Mutual Society and the Official Liquidator thereof* (1879–80) 5 App Cas 685 at pp 697, 701 and 709; *Dow Hager Lawrence v* C *Lord Norreys & Ors* (1890) 15 App Cas 210 at p 221; *Blay v Pollard* [1930] 1 KB 628, *L'Estrange v Graucob* [1934] 2 KB at p 403. It is not necessary that the word 'fraud' should be used in the pleadings, it is enough if it is stated distinctly that fraud is charged, ibid.

While it is true that the averments in paras (18), (20) and (21) of the D plaintiffs' statement of claim have not set out the full particulars of fraud, they have nevertheless made specific reference to some elements of fraud which cannot be completely ignored by the court. The court has the duty to consider all these averments, albeit incomplete, for whatever they are worth in their original version, to ascertain if there is in effect a reasonable cause raised therein. After anxiously considering these averments, I am of E the view that these averments do raise a reasonable cause of action. Further, rules of court do provide for the amendment of the plaintiffs' statement of claim to bring out a complete particularization of fraud (see O 20 of the RHC). This is also a serious issue to be tried.

In addition to the averment of fraud, the plaintiffs also raised the plea F of illegality in the transfer of the said land, whereby the plaintiff have been rendered the aggrieved parties as their rights have been allegedly affected. There is therefore a reasonable cause of action or, at any rate, a serious question to be tried.

It was stated in *Mallal's Supreme Court Practice* (at p 220) that:

G *No reasonable cause of action or defence.* It is only in plain and obvious cases that recourse should be had to the summary procedure under this rule, for example, where the statement of claim discloses no cause of action: *Ban Guan Sdn Bhd v United Malaysian Steel Mills Bhd* [1977] 2 MLJ 240 (FC). Thus, in *Prince v Gregory* [1959] 1 All ER 133; [1959] 1 WLR 177, a statement of claim which disclosed no cause of action in so far as it affected H the second defendant was struck out. As to the question whether a plaint discloses a cause of action, it was held in *Peck v Russel* [1923] 4 FMSLR 32 (CA) that the plaint and its documents alone should be considered and all the allegations in it should be assumed to be true. If there is a point of law which requires serious discussion, an objection should be taken on the pleadings, and the point set down for argument: *Low Yat v Grace* [1947] I MLJ 115, *Cadam & Ors v Beaverbrook Newspapers Ltd* [1959] 1 QB 413; [1959] 1 All ER 453; [1959] 2 WLR 324 (CA). If there is an issue to be tried, it can only be tried by the action pursuing its normal course and being heard in open court: *Low Yat v Grace* (supra). A pleading will not be struck out under this rule 'unless it is not only demurrable, but something worse

than demurrable', ie such that no legitimate amendment can save it from being demurrable, per Chitty J in *Republic of Peru v Peruvian Guana Co* (1887) 36 Ch D 489. The mere fact that the case is weak and unlikely to succeed is no ground for striking out the statement of claim; nor is the fact that the claim appears to be barred by some statutory defence as, for example, limitations: *Murray v Secretary of India* [1931] WN 91.

The principles on which the court will exercise its powers to strike out a claim summarily has been set out recently by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 at p 37 as follows:

(1) The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

(2) ... So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. It cannot be said that they were frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings were otherwise an abuse of the process of the court.

Since the plaintiffs' statement of claim did disclose a reasonable cause of action against the sixth, seventh and eighth defendants, I am of the view that the learned senior assistant registrar has erred in striking it out against these defendants. I therefore allow this appeal with costs and set aside the order of the learned senior assistant registrar.

Appeal allowed.

Reported by Khoo Chuan Swee